

BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

February 9, 2005

IN RE:)	
)	
PETITION OF TENNESSEE UNE-P)	DOCKET NO.
COALITION TO OPEN A CONTESTED)	02-00207
CASE PROCEEDING TO DECLARE)	
SWITCHING AN UNRESTRICTED)	
UNBUNDLED NETWORK ELEMENT)	

SECOND REPORT AND RECOMMENDATION

This docket is before the Hearing Officer to consider the comments of the UNE-P Coalition filed on December 1, 2004 in response to the *Notice of Filing* issued on November 10, 2004.

On February 25, 2002, the UNE-P Coalition¹ filed a *Petition to Open Contested Case Proceeding* requesting that the Authority establish local switching as an unrestricted, unbundled network element on a statewide basis. On May 20, 2002, the UNE-P Coalition amended its petition to clarify that the relief it sought was limited to unrestricted access to local switching in BellSouth Telecommunications Inc.'s service territory.

On August 21, 2003, the Federal Communications Commission ("FCC") released its *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking* ("TRO").² In the TRO, the FCC modified its rules regulating the unbundling of local circuit switching.

¹ At the time that the *Petition to Open Contested Case Proceeding* was filed, the UNE-P Coalition consisted of the following companies: Access Integrated Networks, Inc.; AT&T Communications of the Southeast, Inc.; Birch Telecom of the South, Inc.; Ernest Communications, Inc.; MCI metro Access Transmission Services, LLC; MCI WorldCom Communications, Inc.; NewSouth Communications Corp.; and Z-Tel Communications, Inc.

² *In re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC03-36 (*Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*) 18 FCCR 19,020 (Aug. 21, 2003).

Among other actions, the FCC requested state commissions make findings in regard to local circuit switching for mass market customers and permitted states to challenge the lack of impairment finding in regard to local circuit switching for enterprise customers. After the release of the TRO, the Tennessee Regulatory Authority opened Docket Nos. 03-00490, 03-00491, 03-00526, and 03-00527 to address the issues presented to state commissions in the TRO, including those involving the regulation of local circuit switching.

On October 27, 2003, the Hearing Officer entered an order suspending all proceedings in the instant docket pending the outcome of any appeals of the TRO and/or the completion of TRA Docket Nos. 03-00490, 03-00491, 03-00526, and 03-00527.³ On March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit issued an opinion in which it vacated much of the TRO, including the subdelegation scheme for network elements such as mass market switching. Thereafter, petitions for writ of certiorari were filed with the United States Supreme Court. The Court denied these petitions on October 12, 2004. In an effort to comply with the Court of Appeals' decision, the FCC issued an *Order and Notice of Proposed Rulemaking* on August 20, 2004.⁴ This order solicited comments on unbundling rules and set out an interim, twelve month plan to stabilize the market.

Given the actions of the federal courts and the FCC, the Hearing Officer issued a *Notice of Filing* on November 10, 2004 directing the UNE-P Coalition to file comments by no later than December 1, 2004 explaining how the docket should proceed. The notice further directed any party wishing to file responsive comments to do so by no later than December 15, 2004.

On December 1, 2004, the UNE-P Coalition filed the following statement:

In response to the Notice of Filing issued November 10, 2004, the UNE-P Coalition would like to inform the Authority that it wishes to withdraw its petition filed in the above-captioned docket. The UNE-P Coalition is withdrawing its

³ *Order Suspending Proceedings*, pp. 2-3 (Oct. 27, 2003)

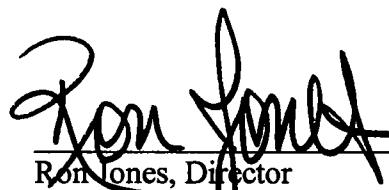
⁴ *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 04-179 (*Order and Notice of Proposed Rulemaking*) 2004 WL 1900394 (Aug. 20, 2004)

petition with the caveat that it may re-file the petition, or a similar petition, in the future if necessary to bring the issue of unbundled switching before the Authority once again.

No other party filed comments either by the December 15, 2004 deadline or at anytime thereafter.

Based on the December 1, 2004 filing and the procedural history of this docket, it is the recommendation of the Hearing Officer that the UNE-P Coalition be permitted to withdraw its *Petition to Open Contested Case Proceeding* and that such withdrawal should not preclude the UNE-P Coalition from filing the same or a similar petition in the future. Further, it is the recommendation of the Hearing Officer that given that the UNE-P Coalition's petition alone resulted in the initiation of this docket and that no other party objected to the withdrawal of that petition this docket should be closed.

The Hearing Officer presents this *Second Report and Recommendation* to the Panel for their consideration at a regularly scheduled Authority Conference to be scheduled by the publishing of a final conference agenda. Any comments on the *Second Report and Recommendation* shall be filed by no later than **Wednesday, February 23, 2005**.



Ron Jones, Director
As Hearing Officer⁵

⁵ During the July 23, 2002 Authority Conference, a panel of the Tennessee Regulatory Authority consisting of then Chairman Sara Kyle and Directors Deborah Taylor Tate and Ron Jones unanimously voted to appoint Director Ron Jones as the Hearing Officer to prepare the case for a hearing by the panel. Transcript of Proceedings, July 23, 2002, pp. 42-43 (Authority Conference).